NO. 83-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE AIR CRASH AT WARSAW, POLAND ON MARCH 14, 1980, MDI 441

POLSKI E. LINIE LOTNICZE (LOT POLISH AIRLINES),

Petitioner,

v.

ANGELA Y. ROBLES, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUUIT

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Questions Presented

Given an admission by LOT Polish Airlines that it did not provide decedent Robles with a ticket for international transportation from New York to Warsaw which included an "Advice to International Passengers on Limitation of Liability" which complied with the "at least as large as 10-point modern type" mandate of the Federal Aviation Regulations ¶221.175 (A) and the Montreal Agreement . . .

1. Was the United States Court of Appeal for the Second Circuit and the District Judge not correct in holding that the airline may not limit its liability to Robles' heirs and that the airline is absolutely liable by reason of its Montreal Agreement waiver of Warsaw Convention defenses; and

2. Does the decision of the appellate court below, which is wholly consistent with *Lisi* v. *Alitalia-Linee Aeree Italiane, S.P.A.*, 370 F.2d 508 (2nd Cir. 1966), *aff'd by an equally divided court,* 390 U.S. 455 (1968) and other appellate court decisions, warrant review by this court.

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Introduction

Respondents oppose LOT Polish Airlines' petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Summary of Argument

This controversy arises in the context of an action for wrongful death. Yreno Roman Robles, Jr. and others were passengers aboard Petitioner's aircraft who were killed when the plane crashed near the end of an international flight from New York to Warsaw. Because of the "international" character of the transportation Petitioner asserted that its liability was limited by the Warsaw Convention[1] as modified by the Montreal Agreement.[2]

The United States Court of Appeals for the Second Circuit and the District Court accepted LOT's *admission* (A3a, A10a, A20a, A22a)* that it did not deliver a ticket to the decedent Robles which included an "Advice to International Passengers on Limitation of Liability" which complied with the minimum 10-point modern type-size requirement set forth in §221.175(a) of the Federal Aviation Regulations (F.A.R.) (A83a) and the Montreal Agreement (A72a). The advice was in 8.5-point type. This failure and breach of the Montreal Agreement precludes the airline from limiting its liability to the decedent's heirs. It furthermore renders the airline absolutely liable for wrongful death damages in accordance with clear and

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.J. No. 876, 137 L.N.T.S. 11 (Adherence of United States proclaimed October 29, 1934).

[2] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement C.A.B. 18900, approved by Order E-28680, May 13, 1966 (Docket No. 17325).

* "A" references are to the Appendix included in Petitioner's Petition herein.

unequivocal terms of the Montreal Agreement and "Tariff" incorporated therein.[3]

The result below follows *Lisi* v. *Alitalia-Linee Aeree Italiene, S.P.A.*, 370 F.2d 508 (2nd Cir. 1966) *aff'd by an equally divided court*, 390 U.S. 455 (1968).

The unanimous decision of the Second Circuit presents no issues of a constitutional dimension, and is wholly consistent with judicial interpretation of the ticket de-

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[3] The "Tariff" reads as follows:

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw, October 12, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague Septembeer 29, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol which, according to the Contract of Carriage, includes a point in the United States of America as a point or origin, point of destination or agreed stopping place
>
> (1) The limit of liability for each passenger for death, wounding or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocoll.
>
> Nothing herein shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

livery requirements of Article 3(2) of the Warsaw Convention[4], as modified by the Montreal Agreement.

For the reasons set forth below, LOT's petition for a writ of certiorari should be denied.

ARGUMENT

The Warsaw Convention was adhered to by the United States in 1934. Its purpose at that time was to limit the liability of international air carriers for death or injury to passengers so that the infant international air-

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[4] Article 3 of the Warsaw Convention provides:

> "(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises the right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.
>
> (2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

line industry could develop. *See,* Lowenfeld & Mendelson, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967). Because the damage limitation adversely affected air travelers by limiting the damages they could recover for death or injury, Article 3 (2) of the Convention mandated that each air carrier "deliver" to its passengers "a statement that the carriage is subject to the rules relating to liability established by this convention" (A97a). *See Lisi* v. *Alitalia, supra.*

Initially promulgated in 1963, F.A.R. §221.175, (28 Fed. Rec. 3281 (1963)) specified the form of "statement" required to disclose the airlines limited liability, and the minimum 10 point modern type-size. International air carriers were required to abide by this regulation as a condition of being awarded a Foreign Air Carrier permit under 49 U.S.C. §1372.

LOT's contention that its violation of the "at least 10 point type" requirement should be overlooked or considered "insubstantial" completely disregards the letter of the law, the intent of the minimum type requirement and the circumstances in which the standard was established.

The history of the Warsaw Convention "notice" provision demonstrates that its breach by LOT is a substantial violation of the treaty. *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967).

By 1965, the United States, acknowledged to be the dominant factor in international air transportation, was so disenchanted and dissatisfied with the low limits of recovery allowed by the Warsaw Convention that on November 15, 1965, it filed a "letter of denunciation" of the treaty which, if not withdrawn, would have become

effective six months later. Had that happened, the United States would no longer have been a party to the treaty. The international airlines, intent upon maintaining the limited liability system, became concerned that they might lose the preferred status they had somehow preserved at the expense of the passengers since 1929, even though, by 1966, it was generally conceded that there was no economic justification for the system.

In order to forestall the United States' November 15, 1965 letter of denunciation from becoming effective, the international airlines with the aid of our Government concluded the Montreal Agreement (A72a). The airline signatories agreed, with respect to international transportation involving a United States point of departure, destination or stopping place,

> (1) to waive the defenses available to them under Article 20 of the Warsaw Convention;
>
> (2) to waive the limitation of liability contained in Article 22 of the Warsaw Convention up to $75,000; and
>
> (3) reiterated that the airlines must give passengers written notice with their tickets of the limitation of liability provisions in at least 10 point modern type.

Based upon the airlines' *contractual* commitments articulated in the Montreal Agreement the United States withdrew its letter of denunciation on May 13, 1966.

The 10 point type requirement was obviously intended to establish a clear, objective and uniform standard of what would be an acceptable and adequate minimum form of notice to passengers of the Warsaw Convention—Montreal Agreement liability limits. The standard was designed

to preclude precisely the arguments about type style and size which LOT urges upon this court now and which were considered by this court in *Lisi* v. *Alitalia-Linee Aeree Italiene, S.P.A.*, 370 F.2d 508 (2nd Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968).[5]

Therefore, giving notice of limited liability in less than "10 point modern type" is, under the Montreal Agreement and F.A.R. §221.175(a) *inadequate as matter of law.*

LOT and all the international airlines knew that following their [Montreal] agreement to abide by the "10 point type standard" they would be estopped from claiming that a smaller print size would constitute compliance. The airlines ratified the standard. The plain meaning of the Montreal Agreement in this regard is clear and unambiguous.

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[5] The Second Circuit has, on numerous occasions, discussed the background and overall effect of the Warsaw Convention and the Montreal Agreement. *See, e.g. Franklin Mint Corp.* v. *Trans. World Airlines, Inc.*, 690 F.2d 303 (2d Cir. 1982); *cert. granted*, —— U.S. —— (1983); *Stratis* v. *Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982); *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 114 (1979); *Reed* v. *Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Husserl* v. *Swiss Air Transport Co.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973); *Molitch* v. *Irish International Airlines*, 436 F.2d 42 (2d Cir. 1970), *rev'd on other grounds*, 436 F.2d 42 (2d Cir. 1970).

Other courts have also considered the history and effect of the Warsaw-Montreal system. *See, e.g., In Re Air Crash In Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982); *Maghsoudi* v. *Pan American World Airways, Inc.*, 470 F.Supp. 1275 (D. Hawaii 1979).

Strict compliance with the Treaty is required for an airline to have the benefit of limited liability.

Ludecke v. *Canadian Pacific Airlines, Ltd.*, 98 D.L.R. 3d 52 (Can. 1979) relied upon by Petitioner (A50a) though finally decided in 1979 involved a March, 1966 Tokyo aircrash with no United States involvement, and no minimum type size requirement by government regulation or agreement. It is, therefore, irrelevant to this controversy or the issues before this court.

Neither LOT nor any other airline can claim any surprise at being deprived of the Warsaw Convention's limited liability if it fails to deliver a proper ticket. *Lisi* teaches that the failure to deliver a proper ticket—one with proper notice of limited liability—has precisely that effect. *Lisi*, 370 F.2d at 514. *See also, Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 861 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

The District Court below correctly noted:

> Here, the character of the performance promised, notice in a specified type size, itself suggests that strict compliance was intended by the parties to the Montreal Agreement. But it is because of the purposes of that agreement and the degree to which they would be frustrated if the argument were permitted that I conclude that LOT's defense of substantial performance must be rejected.
>
> The purpose of the Montreal Agreement (as distinguished from the purpose of the "special contracts" between carriers and passengers entered into pursuant to it), like the purpose of the Warshaw Convention it preserved, was to regulate by uniform terms the conditions on which the United States would continue to adhere to the Warsaw Convention and on which the air carriers would hereforth deal with their customers. *See Reed* v. *Wiser*, supra, 555

> F.2d at 1090-91. Thus, while the purpose of the contract evidenced by the passenger ticket was to provide international air transportation and give "adequate" notice of the carrier's limitations on its absolute liability, the purpose of the Montreal Agreement was to secure a uniform standard as to what constituted adequate notice subject to easy administration and rapid determination of the parties' rights. *Id.* Given such a quasi-legislative purpose it may be doubted whether the doctrine of substantial performance has any application at all to a contract such as this one.

It is now universally accepted that the liability of an airline engaged in international transportation is limited only if it delivers a ticket which gives adequate and proper notice to a passenger of the limitations imposed by the Warsaw Convention-Montreal Agreement scheme. *Demanes* v. *Flying Tiger Line, Inc.*, 10 Avi. 17,611 (N.D. Cal. 1967); *Glassman* v. *Flying Tiger Line, Inc.*, 9 Avi. 18,295 (N.D. Ca. 1966); *Burdell* v. *Canadian Pacific Airlines, Ltd.*, 10 Avi. 18,151 (Ill. Cir. 1968); *Bayless* v. *S.A. Empress de Viacao Aereline Rio Grandense*, 10 Avi. 17,881 (S.D.N.Y. 1968); *Molitch* v. *Irish International Airlines*, 11 Avi. 17,396 (S.D. N.Y. 1970), *rev'd on other grounds*, 436 F.2d 42 (2d Cir. 1970); *Manion* v. *Pan American World Airways, Inc.*, 55 N.Y.2d 398, 449 N.Y.S. 2d 693 (1982).

In *Lisi*, this Court rejected a four-point type notice. As Judge Kaufman writing for the Second Circuit Court there stated, the notice was "camouflaged in Liliputian print", 370 F.2d at 514, and did not give passengers the notice require by Article 3(2) of the Warsaw Convention. Since *Lisi* involved pre-Montreal Agreement transportation, there was arguably an issue as to what constitutes adequate notice under Article 3(2). The Montreal Agreement, and

the Federal Aviation Regulation it incorporates, subsequently defined *as a matter of law* what typesize constitutes adequate notice of the carriers' limited liability.

Now despite the fact that Federal Aviation Regulation §221.175(a) provides that the notice of limitation of liability be printed in type "at least as large as ten point modern type"; and despite the fact that the Montreal Agreement, to which LOT is a signatory, calls for precisely the same minimum requirement; and despite the fact that LOT, in its own tariff, has contracted to comply with the Federal Aviation Regulations Petitioner still claims that the requirement has no binding significance.

Simply stated, LOT's failure to abide by the objective standard notice of limited liability to which it subscribed deprives it of such limited liability under the Convention and Montreal Agreement. The airlines, including LOT have preserved the limited liability system in international transportation by promising our government, and through it the international airline passengers, that, among other things, they would give Notice of the Warsaw Convention liability limitations in "10 point type". LOT cannot complain or seek relief from its failure to abide by its express written convenants, F.A.R. §221.175(a) and its own tariff.

As the District Court below observed, LOT should be precluded from asserting its defenses both under the Agreement and under the underlying Warsaw Convention if it failed to deliver adequate notice:

> Plaintiffs argue that the effect of defendant's breach of the notice provisions of the Montreal Agreement is not a return to the Article 20(1) defenses, but rather application of the relevant provisions of the underlying Convention which the Agreement modi-

> fies, specifically that part of Article 3(2) which precludes assertion of defenses limiting or excluding liability in the absence of delivery of a ticket meeting the requirements of the Convention . . .
>
> Since the Montreal Agreement was clearly intended to operate within the framework and incorporates all the relevant provisions of the Convention, Lowenfeld & Mendelsohn, *supra,* 80 Harv. L. Rev. at 597, the defendant's breach of the provisions of the Montreal Agreement with respect to the delivery of a conforming ticket has the same effect as non-delivery of a conformink ticket as set forth in Article 3(2) of the Convention. Accordingly, I conclude that defendant is not entitled to assert its defenses under Article 20(1) of the Convention as to those claimants suing on behalf of decedents to whom the defendant failed to deliver a ticket meeting the type size requirements of the Montreal Agreement.

The Second Circuit correctly understood the interplay of the Montreal Agreement and Convention and recognized the unfairness of any other result.

To allow LOT to reassert an Article 20(1) defense where it has breached the "notice" provision would be to allow it to be advantaged by its own violation. This would be plainly inconsistent with the intent of the Montreal Agreement and would shift the burden of LOT's breach to the innocent passenger.

CONCLUSION

Petitioner has not shouldered its burden of identifying special or important considerations warranting review on certiorari. Indeed, the opinion of the United States Court of Appeals for the Second Circuit was entirely correct. For the foregoing reasons it is respectfully requested that the petition for the writ of Certiorari sought by LOT Polish Airlines be denied.

Respectfully submitted,

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